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The Future of the Insanity Defense in Illinois

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THE FUTURE OF THE INSANITY DEFENSE IN ILLINOIS

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The criminal defendant who attempts to assert the insanity defense in Illinois faces many practical difficulties. Among these are unclear definitions, few expert witnesses, damaging influence of lay witnesses, and the burden of raising a reasonable doubt of sanity before it can become an issue. The author advances a recommendation that the insanity issue be resolved after the criminal trial. Such a post-trial hearing would make the defendant's assertion of insanity easier and would maintain judicial supervision of the defendant until adjudged sane and safe.

INTRODUCTION

The law relating to criminal insanity has been debated over the last twenty years.[1] Authors, as well as courts, have had difficulty defining the concept.[2] The defendant has been faced with prob-

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1. *See* H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954); Baur, *Legal Responsibility*, 57 NW. L. REV. 12 (1962); Bleechmore, *Towards a Rational Theory of Criminal Responsibility: The Psychopathic Offender*, 10 MELB. L. REV. 19 (1975); Lynch, *The Insanity Defense*, 55 CHI. B. REC. 210 (1974); Wales, *Analysis of the Proposal to 'Abolish' the Insanity Defense in S.#1: Squeezing a Lemon*, 124 U. PA. L. REV. 687 (1976); Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URB. L. 471 (1976); Note, *Modern Insanity Tests—Alternatives*, 15 WASHBURN L. J. 88 (1976).

Many proposals for change have been put forward not only by members of the bar but also by psychiatrists, psychologists and sociologists. *See, e.g.*, R. SIMON, THE JURY AND THE DEFENSE OF INSANITY (1967); Fingarette, *Disabilities of Mind and Criminal Responsibility—A Unitary Doctrine*, 76 COLUM. L. REV. 236 (1976); Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint*, 48 A.B.A. J. 527 (1962) [hereinafter cited as Overholser].

2. The first famous insanity test was Daniel M'Naghten's Case, 8 Eng. Rep. 718 (1843), which held that the critical question was whether at the time of the act, the defendant was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act, or if he did know it, that he did not know it was wrong. A major revolution occurred in 1954 with Judge Bazelon's opinion in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), which introduced a new "modern" test: an accused is not criminally responsible if his unlawful act was the product of mental disease or a mental defect. The District of Columbia Circuit modified the *Durham* test in McDonald

lems in raising the defense while the public has felt threatened by the practical consequence that acquittal of criminal defendants by reason of insanity may permit premature release of dangerous offenders.[3] This Article discusses the legal and medical concepts of insanity and the practical and procedural problems of the insanity defense for the defendant. Finally, a recommendation is advanced for the future of the insanity defense in Illinois. The proposal attempts to rectify deficiencies in current Illinois law by balancing the interest of the defendant in improving the insanity defense and obtaining needed treatment against the interest of society in providing appropriate treatment for the offender and adequate protection of the public.

CURRENT PROBLEMS OF THE INSANITY DEFENSE

Conflicting Concepts of Insanity

A central problem with the insanity defense in Illinois is the vagueness of the statutory definition. The Illinois statute[4] relieves a defendant of criminal liability if at the time of the crime a

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v. United States, 312 F.2d 847 (D.C. Cir. 1962) (en banc) by defining the terms "mental disease or defect" to include any abnormal mental condition which substantially affects mental or emotional processes and substantially impairs behavior controls. Subsequently, the American Law Institute propounded its own test in the MODEL PENAL CODE §4.01:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

The District of Columbia Circuit adopted the A.L.I. test prospectively in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). Illinois has also embraced a modified form of the A.L.I. test, ILL. REV. STAT. ch. 38, §6-2 (1975).

3. *See, e.g.*, Lyon, *The Law on Insanity—Time for Its Own Trial?*, Chi. Trib., Oct. 29, 1976, at 1, col. 2; Mabley, *Crime, Insanity: Revolving Door*, Chi. Trib., Oct. 24, 1976, at 4, col. 1; Nicodemus & Rooney, *Agencies Pass the Buck Over Release of a Killer*, Chi. Daily News, Oct. 29, 1976, at 4, col. 1; *Judge Asks New Law on Criminally Insane*, Chi. Sun-Times, Oct. 14, 1976, at 38, col. 1.

4. ILL. REV. STAT. ch. 38, §6-2 (1975) provides:

> (a) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
>
> (b) The terms "mental disease or mental defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

"mental disease or defect" prevented the defendant from understanding the wrongfulness of the conduct or from conforming to the law. This formulation, which is similar to the ALI Model Penal Code provision,[5] encompasses the modern considerations of psychiatry and also the tests of insanity developed in case law. The original test, termed the *M'Naghten* formula,[6] defined insanity as the defendant's inability to know the act was wrong, thus negating the possibility of criminal intent. The 1954 decision in *Durham v. United States*[7] established an alternative approach, excusing a defendant whose unlawful act was not voluntary but rather was the product of a mental disease or mental defect. Thus, the Illinois test for insanity considers both the mens rea element central to the *M'Naghten* knowing-right-from-wrong test and the voluntariness element embodied in the *Durham* product test.

The major difficulty in applying the Illinois standard for insanity is defining meaningfully the term "mental disease or defect." Although the courts commonly rely upon it, reviewing courts in Illinois have not defined the term.[8] Case law states only what it is not.[9] The courts also have held that no particular mental condi-

5. For the text of the A.L.I. provision *see* note 2 *supra*.

6. Daniel M'Naghten's Case, 8 Eng. Rep. 718 (1843). *See* note 2 *supra*.

7. 214 F.2d 862 (D.C. Cir. 1954). *See* note 2 *supra*.

8. Because the test for insanity is vague, reviewing courts should aid the trial bench and bar by formulating jury instructions and by defining the statutory test. Yet, as stated in S. GLUECK, LAW AND PSYCHIATRY 46 (1966), appellate courts have neglected this responsibility.

> The trial record is examined only in cases of appeal after conviction; and it is in reviewing such cases for errors at the trial that the appellate tribunal can guide courts in formulating their instructions to the jury and in pouring meaningful content into the artificial tests. That they have in fact not done so was the complaint of Judge Bazelon in his lectures in the *Issac Ray* series. . . .

Id.

Instead, appellate courts consistently have used three methods to avoid substantive review. They have deferred to the "trier of fact" and have upheld the testimony of lay witnesses on the sanity of the defendant. *See* note 30 *infra*. Also, they have discounted expert witnesses. *See* People v. Elliott, 32 Ill.App.3d 654, 336 N.E.2d 146 (5th Dist. 1975) (the court noted that the experts had not "treated defendant recently and extensively" and disagreed on the diagnosis); People v. Arnold, 17 Ill.App.3d 746, 308 N.E.2d 261 (1st Dist. 1974) (such factors as the timing of the examination and who paid the expert's fee were cited by the court in discounting the testimony of expert witnesses).

9. People v. Miller, 33 Ill.2d 439, 211 N.E.2d 708 (1965) (personality disorders are not mental disease); People v. Moore, 19 Ill.App.3d 334, 311 N.E.2d 401 (3d Dist. 1974) (emotional distress is not mental disease).

tion or status constitutes insanity per se.[10] Medical experts likewise do not define mental disease or defect. The term is absent from most theoretical, textbook, and clinical literature of the psychiatric profession.[11] In psychological literature there is neither a definition of "mental disease," nor a general agreement in the profession on how to approach one.[12]

Psychiatrists have formed three medical diagnostic categories in dealing with the concept of insanity: psychosis,[13] personality disorders[14] and neuroses.[15] Of the three categories, psychiatry generally has equated only psychosis with criminal insanity.[16] The

10. Various decisions have catalogued mental conditions considered not to be insanity per se, including: People v. Ford, 39 Ill.2d 318, 235 N.E.2d 576 (1968) (psychosis); People v. Miller, 33 Ill.2d 439, 211 N.E.2d 708 (1965) (personality disorders); People v. Pugh, 409 Ill. 584, 100 N.E.2d 909 (1951) (a sadistic and cruel mind); People v. Howe, 375 Ill. 130, 30 N.E.2d 733 (1940) (prior adjudication of insanity); People v. Parisie, 7 Ill.App.3d 1009, 287 N.E.2d 310 (4th Dist. 1972) (homosexuality); People v. Burress, 1 Ill.App.3d 17, 272 N.E.2d 390 (4th Dist. 1971) (pyromania and irresistable impulse); People v. Conrad, 81 Ill.App.2d 34, 225 N.E.2d 713 (1st Dist. 1967) (amnesia).

11. H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 24-26 (1972) [hereinafter cited as CRIMINAL INSANITY].

12. *Id.* at 28. *But see* Wales, *Analysis of the Proposal to 'Abolish' the Insanity Defense in S.#1: Squeezing a Lemon*, 124 U. PA. L. REV. 687, 695 (1976). The author of the article states that the terms "mental defect and mental disease" are medical terms which are unfamiliar to lawyers who deal in moral-legal terms (mens rea). The terms appear to belong to neither the medical nor the legal professions.

13. Psychosis is marked by a considerable loss of contact with reality or an extreme elevation or depression of mood. Psychosis may have either an organic or non-organic basis. Non-organic psychotic disorders are sometimes known as "functional psychotic disorders."

14. The term includes the so-called sociopathic personality. The sociopath is generally characterized by lack of foresight, egocentricity, failure to profit by experience, impulsiveness, lack of sympathy, general immaturity, and very little regulatory influence of intellect upon his behavior.

15. The individual suffering from neuroses is usually in substantial contact with the environment. The neurotic may realize that he is not well and may suffer from various phobias or such conditions as kleptomania. Yet, he will not permit himself to indulge in desires and fantasies as frequently as would the psychotic. Overholser, *supra* note 1, at 529.

The compulsive neurotic typically exhibits the "irresistible impulse" or "momentary insanity." This condition which affects the subject's view of reality and will power is clearly neurotic rather than psychotic. *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 488 (2d ed. 1960); H. WEIHOFEN, MENTAL DISORDERS AS A CRIMINAL DEFENSE 96 (1954).

16. CRIMINAL INSANITY, *supra* note 11, at 31.

The psychotic will indulge in impulses and then rationalize his conduct by a gross distortion in his consciousness of even the most patent norms of the "real world." Because of this distortion and his inability to correct it, the psychotic will be unable to take the law rationally into account and will be unable to conform when the law stands in the way of his psychotic impulses and aims. When no such conflict arises, the psychotic can appear

other two may be associated with criminal behavior but do not constitute insanity. A person with a sociopathic personality disorder, for instance, may engage in repeated criminal conduct but will not for that reason be classified as insane by either psychiatry[17] or the Illinois statutory provision.[18] Likewise, most psychiatrists agree that neurotic conditions should not be classified as criminal insanity.[19]

The problems caused by the statutory and medical definitions of insanity become most apparent in jury deliberations. Most jurors do not understand the medical experts and do not apply the statutory standard. For example, a study on jurors confronted with the insanity defense concluded that juries disregarded the court's instructions and the medical testimony in reaching their verdicts.[20] The study stated: "For most jurors, the defendant's admission that he knew that what he was doing was wrong proved that he was guilty and sane."[21] Jurors apparently weigh the insanity defense by their own common understanding and experience. By so doing, they effectively deny to the defendant the major advantage of the Illinois statutory test, its adaptability to changes in medical theory.

Any realistic solution to the current problems of applying the statutory definition of criminal insanity must assign the proper role to the medical expert, the attorney, and the layman juror and permit meaningful communication among them.[22] The current statutory provision does not in practice accomplish its intended result because juries retain the power to apply the statutory test of insanity.

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quite normal. However, the neurotic is far more susceptible to adequate treatment and can function normally in society as long as his fantasies are controlled. His ability not to indulge in fantasies places his intent in a category separate from that of the psychotic. Overholser, *supra* note 1, at 529. *See also* CRIMINAL INSANITY, *supra* note 11, at 227-32.

17. Overholser, *supra* note 1, at 529.

18. ILL. REV. STAT. ch. 38, §6-2(b) (1975).

19. Overholser, *supra* note 1, at 529.

20. R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 161 (1967).

21. *Id.*

22. *See, e.g.*, United States v. Brawner, 471 F.2d 969, 982-83 (D.C. Cir. 1972). The court spoke of the need to improve and permit "three-way communication" among lawyers, experts, and lay jurors. The court noted that this communication was missing under the *Durham* test and it expressed its hope that the A.L.I.'s test would permit more reasonable communication among them.

Securing Expert Testimony

Another major problem facing the defendant in asserting the insanity defense is the practical aspect of securing expert testimony for trial, since the market of available experts is limited. Few psychiatrists and psychologists are interested in the criminal insanity area. Also, there is a reluctance to submit to cross-examination.[23] Where a professional is highly regarded in his own field and his opinions well respected, cross-examination by a skilled trial attorney can be a humiliating experience.[24] Such testimony also can be very time consuming and disruptive of private practice. The expert who interviews a defendant may well have to wait many months before testifying, at which time the expert must review the facts and diagnosis. Experience indicates that the expert may then be hurriedly called to testify only to wait outside the courtroom for several hours.

The lack of available expert testimony also may be due to the failure of the courts to provide guidance for the expert on the term "mental disease or defect."[25] This has caused problems with experts who find themselves unable to communicate with lawyers and the lay jury.

The high cost of expert testimony is an additional barrier which may be insuperable.[26] The defendant either must hire an expert at personal expense or rely on court-appointed experts. Although Illinois courts may appoint experts for defendants who cannot afford them,[27] doing so in practice does not remedy the problem.

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23. Overholser, *supra* note 1, at 528-29.

Other differences arise in the analysis of the expert's diagnosis. The psychiatrist finds it most difficult to give "yes" or "no" answers, and deals with his opinion as a whole. The law, however, allows the expert to be cross-examined on each individual part of his diagnosis. CRIMINAL INSANITY, *supra* note 11, at 83.

24. *See, e.g.*, United States v. Brawner, 471 F.2d 969, 1036-37 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part) (noting that the psychiatrist's testimony is particularly vulnerable to cross-examination and is easily ridiculed in closing argument).

25. *See* note 8 *supra*.

26. While the cost of expert testimony can vary greatly within the medical profession, a reasonable rate among private psychologists would be $150 to $250 for testing and interpretation and $250 per half day for testifying. For the private psychiatrist, the fee would range from $50 to $100 per hour.

Limited access to expert assistance and other problems faced by indigent defendants asserting the insanity defense are particularly noted in United States v. Brawner, 471 F.2d 969, 1036 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part).

27. *See, e.g.*, People v. Clay, 19 Ill.App.3d 296, 299, 311 N.E.2d 384, 386 (2d Dist. 1974) (no error in denying public funds to "explore the mere possibility of raising insanity as a

In the First Judicial District (Cook County), for instance, the indigent and low income defendant must rely upon the Psychiatric Institute which is affiliated with the Circuit Court. Because of its use by the prosecution and the defense, the Psychiatric Institute is as overburdened as the rest of the criminal justice system and attention given to individual cases may be inadequate.

The Lay Witness

Even when adequate expert testimony is presented, its impact on the jury is subordinate to that of lay witness testimony. Although the lay witness is often overlooked in discussing the insanity defense, lay testimony in practice seems to have greater impact on the jury than the expert witness. The medical expert is likely to appear detached from the defendant because his contact with the defendant was brief and was long after the offense. His detachment, when combined with his use of theoretical and technical terms, such as psychosis, personality disorders, and neurosis, may detract from his ability effectively to influence the jury. In contrast, generally, the lay witness observed the defendant at the time of the crime or shortly thereafter[28] and may have known the defendant for some time. In presenting its case, the prosecution relies primarily on the lay witness who, rather than discussing abstract theories, stresses the facts, particularly those showing normal conduct by the defendant. The prosecution's lay witness testimony often defeats the defendant's effort to use the insanity defense, for experience indicates that juries frequently find a defendant guilty on the strength of lay opinion[29] despite

defense" despite defendant's psychiatric history where there was insufficient showing by defendant that funds were needed for expert witness who could be "deemed crucial to a proper defense").

28. The lay witness' personal observations, however, are not confined to the time of the crime. In fact, lay opinion testimony has been permitted when the observations were made as late as three and one-half hours after the crime. People v. Lassiter, 133 Ill.App.2d 353, 355, 273 N.E.2d 166, 167 (1st Dist. 1971) (no error to allow the sanity opinion of an assistant state's attorney who questioned the defendant three and one-half hours after the crime).

29. *See* R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 143-44 (1967). The study on jurors and the defense of insanity demonstrated that the jury in its deliberations places particular emphasis upon the facts of the crime and the manner in which the crime was conducted.

overwhelming expert testimony of insanity.[30] These jury findings are rarely reversed by appellate courts.

The greater influence of lay opinion over expert testimony is another indication of the divergence among legal, medical, and lay conceptions of insanity. The Illinois statutory phrase "mental disease or mental defect" implies the necessity of expert assessment of the defendant.[31] Experts believe that a lay witness is incapable of rendering such an opinion on the sanity of a defendant because a mentally ill offender may appear normal to the untrained observer. However, expert testimony is not required at any stage of a case involving a sanity issue.[32] The decisions of lay jurors seem to be closely related to the testimony of lay witnesses. Neither expert testimony nor statutory standards appear to have a major impact on jury decisions on the insanity issue. The jury's acceptance of lay opinion testimony in this area severely cripples the potential of expert testimony, creates a major obstacle for the defendant's assertion of insanity, and is perhaps the greatest weakness of the insanity defense.

Burdens of Proof in the Insanity Defense and the Redmond *Standard*

The difficulties in applying the insanity defense in Illinois have been increased by recent case law that made significant changes in the defendant's burden of raising the issue of insanity at trial

30. People v. Ford, 39 Ill.2d 318, 235 N.E.2d 576 (1968); and People v. Banks, 17 Ill.App.3d 746, 308 N.E.2d 261 (1st Dist. 1974) are excellent examples of this. In both cases, the defendants had long histories of mental and emotional illness and several experts and lay persons testified for the defense that the defendant was insane. In each case, police officers (in *Banks* only one officer) testified for the prosecution that the defendant acted normally a short period of time after the crime and that the defendant was sane. In both cases, the convictions were affirmed.

31. People v. Ehrler, 114 Ill.App.2d 171, 184, 252 N.E.2d 227, 233 (2nd Dist. 1969) (the adoption of the phrase "mental disease or mental defect" was intended to conform the language of the statute to terms "more congenial to modern psychiatry").

32. Neither defense nor prosecution is required to provide expert testimony in order to satisfy its burden of proof. People v. Redmond, 59 Ill.2d 328, 320 N.E.2d 321 (1974); People v. Smothers, 55 Ill.2d 172, 302 N.E.2d 324 (1973); People v. Childs, 51 Ill.2d 247, 281 N.E.2d 631 (1972); People v. Horton, 29 Ill.App.3d 704, 331 N.E.2d 104 (1st Dist. 1975). *See* notes 33-44 and accompanying text *infra*. This position was reaffirmed most recently in People v. Greenfield, 30 Ill.App.3d 1044, 1048, 333 N.E.2d 36, 40 (4th Dist. 1975). The court, relying upon prior decisions, still held that in rebuttal the state need not introduce expert opinion evidence. In *Greenfield*, the state brought out in rebuttal the lay opinion of the victim.

and the prosecution's corresponding burden of rebutting the defense. Three Illinois Supreme Court decisions have been of particular significance: *People v. Childs*,[33] *People v. Smothers*,[34] and the current leading case in the area, *People v. Redmond*.[35]

The *Childs* decision, in 1972, held that if the defense provided "some evidence" which raised "a doubt" concerning sanity, then the prosecution was required to prove the defendant sane "beyond a reasonable doubt."[36] Psychiatric testimony was not required to raise the issue of defendant's insanity at the time of commission of the crime.[37] The defendant's burden in *Childs* was satisfied by a showing that he had previously spent years in a mental institution, escaped, and had been diagnosed as paranoiac even though no recent evidence of insanity was presented.

One year later, the procedural rule was modified in favor of the prosecution by the *Smothers* decision which required the defendant to raise not merely "a doubt" but rather "a reasonable doubt" of sanity at the time of the crime.[38] Evidence of irrational and bizarre conduct, standing alone, was held insufficient to satisfy the defendant's burden.[39] The *Childs* case was distinguished on the grounds that in *Childs* evidence of both prior irrational conduct and prior mental treatment had been presented.[40]

Redmond, in 1974, appeared to impose higher burdens on both parties to the litigation by holding that the defendant must establish a reasonable doubt of sanity.[41] Once the defendant challenges the presumption of sanity, it follows logically that the prosecution cannot obtain a conviction unless it effectively rebuts defendant's evidence.[42] In *Redmond* the court held that the defense

33. 51 Ill.2d 247, 281 N.E.2d 631 (1972).
34. 55 Ill.2d 172, 302 N.E.2d 324 (1973).
35. 59 Ill.2d 328, 320 N.E.2d 321 (1974).
36. 51 Ill.2d 247, 256, 281 N.E.2d 631, 635 (1972).
37. *Id.* at 257, 281 N.E.2d at 636.
38. 55 Ill.2d 172, 174, 302 N.E.2d 324, 326 (1973).
39. *Id.* at 175, 302 N.E.2d at 326.
40. *Id.*
41. 59 Ill.2d 328, 338, 320 N.E.2d 321, 326 (1974).
42. Prior to the *Redmond* decision, the state was not required to provide rebuttal testimony. As one reviewing court stated:

> When the presumption of sanity has been overcome the question of a defendant's sanity or insanity is to be determined from the whole evidence, without reference to the presumption.

People v. Lono, 11 Ill.App.3d 443, 449, 297 N.E.2d 349, 354 (1st Dist. 1973).

failed to satisfy its burden despite defense testimony by the police officer that the accused did not "act quite normal," by another witness that the accused "lost his mind" at the time of the offense, and by the defendant that he heard "voices and spirits."[43] The court found that the defense had presented "some evidence" but had not raised a "reasonable doubt."

As a result of these decisions, the insanity defense in Illinois now imposes a high burden of proof upon both defense and prosecution. An initial presumption of sanity operates to prevent the issue from reaching the trier of fact unless the defendant raises "a reasonable doubt" of sanity. Once the presumption is overcome, however, the state faces a directed verdict of acquittal by reason of insanity unless it provides rebuttal evidence sufficient to prove sanity beyond a reasonable doubt.[44]

Thus, while legal theory on the insanity defense has progressed considerably in the last two decades,[45] the realistic problems of its application in Illinois have remained. The conflict in terminology between the professions, the failure of reviewing courts to provide adequate definitional guidance, the lack of available experts, and the heavy reliance upon the layman witness and juror have negated the advances in theory. A final shortcoming of the current insanity defense in Illinois is apparent from the public perspective. Newspapers reflect society's fear that a defendant acquitted by reason of insanity and committed may be released from a mental institution without judicial supervision or control.[46] Recognition of these practical problems makes it clear that proposals for change in the insanity defense are needed.

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43. 13 Ill.App.3d 604, 607-08, 300 N.E.2d 786, 788-89 (1973).

44. *But see* People v. Horton, 29 Ill.App.3d 704, 331 N.E.2d 104 (1st Dist. 1975). The defendant introduced a psychiatrist's testimony, and the state conceded that defendant met his burden, but the state put nothing on in rebuttal. The court held that, "It is for the trier of fact to determine from *all* the evidence whether the state had fulfilled its burden." *Id.* at 710, 331 N.E.2d at 109. The court then went on to affirm the defendant's conviction. The logic of the court's opinion is subject to question in light of *Redmond,* which seems to require specific rebuttal on the insanity issue, not merely as here incidental testimony by the officer.

45. *See* note 2 *supra.*

46. *See* note 3 *supra.*

PROPOSAL: "GUILTY, BUT INSANE"

Proposed Legislative and Judicial Changes

The shortcomings of the current law of criminal insanity in Illinois may be remedied by removing the insanity issue from the trial phase of the criminal process. First, the trial would result in a determination as to whether the defendant committed the criminal act. Then a post-trial hearing for the guilty defendant would be held to determine whether the defendant's mental condition at the time of the crime makes commitment to a mental institution more appropriate than sentence to a penitentiary.

Implementation of this proposal would necessitate action by both the legislature and the courts. The first step would be the deletion from the criminal statutes of the affirmative defense of insanity and the insertion of a section stating that the question of a defendant's sanity would no longer be part of the trier of fact's determination of guilt or innocence.[47] The primary purpose of this change is to remove the question of sanity from the jury where most of the current practical problems are found.[48] For public policy reasons, the state would be relieved of the burden of proving defendant's sanity in order to obtain a conviction and would be required to prove only the factual circumstances of the

47. Present statutes dealing with competency to stand trial would not be affected.

48. Suggestions of other alternatives to the insanity defense only give the lay jury more leeway in determining the insanity issue. *See* United States v. Brawner, 471 F.2d 969, 1036 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part); Wales, *Analysis of the Proposal to 'Abolish' the Insanity Defense in S.#1: Squeezing a Lemon*, 124 U. PA. L. REV. 687, 710-11 (1976). By adding the concept of a "just verdict," for instance, there is an additional factor for the jury to weigh in its insanity determination.

The State of Michigan has recently adopted "guilty but mentally ill" statutes noted and discussed in Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URB. L. 471 (1976). The statutes require notice prior to trial of a possible insanity defense. Four forms of verdicts are to be submitted to the jury: guilty, not guilty, not guilty by reason of insanity, and guilty but mentally ill. In order to return the verdict guilty but mentally ill, the jury must decide that 1) defendant was proven guilty beyond a reasonable doubt, 2) defendant was mentally ill at the time of the crime, and 3) defendant was not insane at the time of the crime. If the jury finds the defendant "guilty but mentally ill," the defendant is sentenced and treated by either the corrections department or the mental health department.

The great fault of the Michigan approach should be obvious—the determination of sanity or mental illness is still left with the jury. In light of the fact that the jury already is confused over insanity and easily rejects that defense, the availability of the insanity defense is not helped by requiring the jury to make yet another determination.

crime from which intent may usually be inferred.[49]

This proposal represents a major departure from the traditional tests which emphasized that the defendant's insanity negated either the mens rea or voluntariness needed to classify the prohibited act as criminal. The current system requires the jury to choose between a verdict of guilty or a verdict of acquittal by reason of insanity. A finding of guilt erroneously implies that the defendant was capable of criminal intent or of conforming his conduct to the requirements of law. Acquittal by reason of insanity suggests no condemnation of the defendant's action. The proposal rationalizes the adjudication process by limiting the role of the jury to a determination of whether the accused committed the acts charged and by reserving the question of proper disposition of the guilty defendant to a post-trial hearing.[50]

That section of the criminal statutes dealing with post-trial motions could be amended to provide that a defendant who wished to raise an insanity issue could do so within thirty days of conviction and prior to sentencing. A hearing would be held, without a jury, to consider both expert and lay testimony on the issue of defendant's mental condition, applying the current statutory definition of insanity. The defendant would have the burden of showing by a preponderance of the evidence that he was insane at the time of the offense. Following the insanity hearing, the trial judge could be required by the statute to make explicit findings of fact regarding the issue of defendant's sanity both at the time of the act and at the time of the post-trial hearing.

After a pre-sentence report, and a further hearing in aggravation and mitigation, the defendant would be sentenced in accordance with the sentencing provisions of the Criminal Code. The sentencing provisons[51] would provide that if the defendant failed

49. Some authorities oppose the abolition of the insanity defense as irreconcilable with the concept of mens rea. *See, e.g.*, United States v. Brawner, 471 F.2d 969, 985 (D.C. Cir. 1972); Fingarette, *Disabilities of the Mind and Criminal Responsibility—A Unitary Doctrine*, 76 COLUM. L. REV. 236, 242 (1976). However, the practical advantages of abolishing the current insanity defense outweigh the theoretical objections. *See* notes 57-58 and accompanying text *infra*.

50. A recent study on juries and the insanity defense observed that "[i]n many instances the jury would have liked to declare the defendant guilty, but insane. That kind of verdict would permit the jurors to condemn the defendant's behavior and at the same time to grant him a special dispensation." R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 178 (1967).

51. ILL. REV. STAT. ch. 38, §§115-3, 115-4, 1005-2-4 (1975).

to prove by a preponderance of the evidence that he was insane at the time of the act, sentencing would follow normal procedures. If the defendant demonstrated insanity at the time of the act and at the hearing, the trial judge would order the defendant involuntarily committed to a state mental institution until sanity is regained. If the court found hospitalization unnecessary, the court could order release on bail or recognizance with strict provisions that the defendant seek mental treatment, and the court could impose any other requirement deemed appropriate.

To insure proper treatment of the defendant and to keep the court abreast of the defendant's status, the court would periodically review the status of the defendant's mental condition *sua sponte* or on motion of the defendant. The state's attorney of the county where the defendant was convicted would have the right to participate in this subsequent review and to offer evidence. Similarly, a hearing would be held to consider defendant's petition for release from confinement. At such a hearing, both parties would participate, present evidence, and the court would enter new findings of fact. The defendant could not be released by the Department of Mental Health; release would be through the court alone.[52]

If the defendant proves by a preponderance of the evidence that he was insane at the time of the act but is sane at the time of the hearing, or has since become sane following commitment, the

52. Under current Illinois law, once a defendant is found not guilty by reason of insanity and he is still insane, the court orders the defendant to be hospitalized and subsequent care, treatment, review, and discharge take place under the Mental Health Code, ILL. REV. STAT. ch. 38, §1005-2-4 (1975). The Mental Health Code, ILL. REV. STAT. ch. 91½, §§1-1 *et seq.* (1975), does not distinguish between persons found not guilty by reason of insanity and other persons who are committed. In contrast to the instant proposal, the Mental Health Code permits such a person to be given an "absolute discharge" by the superintendent of the hospital "at any time" with no prior notice or court approval required, ILL. REV. STAT. ch. 91½, §10-4 (1975).

The results of the application of current Illinois law can be tragic. In a recent example, a defendant found not guilty by reason of insanity was released by the treating hospital four years after his trial for murder. A letter from a state psychiatrist noted that the defendant might be subject to a recurrence of violent behavior if outside of institutional care. Five months after the defendant was released from the hospital, the defendant beat a security guard to death without any provocation. Both the state's attorney and the trial judge noted that the action of the Department of Mental Health in releasing the defendant from hospitalization without any notice to the court was "outrageous." The Department of Mental Health and the releasing hospital each blamed the other for the release of the defendant. Nicodemus & Rooney, *Agencies Pass the Buck Over Release of a Killer*, Chi. Daily News, Oct. 29, 1976, at 4, col. 1.

trial court would be allowed to impose a sentence of no less than 6 months nor more than 2 years or provide for a special conditional discharge. The court could impose such reasonable restrictions upon the defendant as it deems necessary to insure the health of the defendant, his continued supervision by responsible persons, and the protection of society. Such restrictions may include but would not be limited to: required medical treatment for defendant, periodic reporting to the court, and supervision and guidance of defendant by responsible persons. At termination of the period of the special conditional discharge, if the defendant has fulfilled the required restrictions, the trial court would discharge the defendant.[53] Penalties for violation of the conditional discharge of course would be necessary.[54]

All orders of the trial court pertaining to sentencing and involuntary commitment under these proposals would be appealable by the defendant or the state to the appellate court as a matter of right and to the supreme court upon petition. These appeal provisions will insure that the proper checks are placed upon the system and will provide for unusual or unanticipated situations. A supreme court rule could establish a procedure for speedy disposition of such appeals in the appellate court.[55]

Finally, it would be advantageous for the supreme court to provide for a special committee of the Illinois Judicial Conference[56] to consider legal issues relating to criminal insanity. The committee would convene at regular intervals to review the status of the mental health facilities and their standard of care, study and review the latest medically accepted concepts of psychiatry and psychology, and work towards establishing judicial standards for interpretation of the insanity test.

53. Such a period of special conditional discharge has two significant advantages: it allows for the protection of society by minimal restrictions upon the now sane defendant, and it helps the defendant in his readjustment to society by providing guidance and any further treatment necessary.

54. A reasonable penalty could be a sentence of confinement to the local department of corrections for six months or the remaining period of the conditional discharge, whichever is greater. The sentencing judge would make recommendations to the department concerning supervision and treatment of the defendant while so confined.

55. The insanity appeal would be treated separately from defendant's appeal of the jury conviction.

56. *See* ILL. SUP. CT. R. 41.

Advantages

The proposed changes would offer significant advantages to the jury, the public, the medical profession, and the defendant. Juries would no longer have to evaluate the conflicting testimony of experts for the prosecution and defense, or apply statutory standards which even the experts cannot deal with adequately. More importantly, juries that believed that the defendant committed the act charged would be permitted to return a verdict of guilty rather than a verdict of not guilty by reason of insanity. The public would be assured that the dangerous mentally ill defendant would be confined and treated, and could not be released without express court findings that the individual no longer presented a danger to society.

Medical experts would be accorded greater latitude in giving answers and explaining reasons for their opinions on the medical condition of the defendant. They would not be expected to state opinions on the essentially moral question of the defendant's responsibility for the acts charged. Strict rules of evidence, including those disallowing hearsay, leading questions, and explanatory answers, could be relaxed since there would be no danger of prejudice to a jury. While, of course, the expert would be subject to cross-examination, it would no longer be necessary for opposing counsel to attack the expert's credibility before the jury.

The resentment of each profession for the other would also be lessened. Attorneys would no longer need to be skeptical of the psychiatrist's "scientificness" and possible influence on the jury,[57] and could concentrate instead on the medical diagnosis and its supporting facts. The expert would be cast more in the role of an advisor to the parties and the court rather than in the role of a biased witness. The new role should be more acceptable to the medical profession.[58]

57. The bar also harbors resentment against the medical expert. The adversary system is the lawyer's institution and he expresses distrust of any interference with it. Lawyers fear the expert, who with his detailed knowledge may virtually dictate to the jury the outcome of the case. *See* CRIMINAL INSANITY, *supra* note 11, at 83. "Each specialty casts the others as scapegoats." Fingarette, *Disabilities of the Mind and Criminal Responsibility—A Unitary Doctrine*, 76 COLUM. L. REV. 236, 237 (1976).

58. Other proposals for abolishing the insanity defense and placing the decision at the dispositional phase seem to rely too strongly on a panel of experts and to ignore the facts of the crime, which are important. *See, e.g.*, Fingarette, *Disabilities of the Mind and Criminal Responsibility—A Unitary Doctrine*, 76 COLUM. L. REV. 236, 242 (1976). The

Advantages to the defendant under the proposed system include the probable availability of a larger number of experts willing to testify in criminal proceedings and the improved understanding of judges of medical issues and medical testimony. In addition, a criminally insane or dangerous defendant would more certainly be confined to a state mental institution where he would receive better treatment than if he were sent to prison. Finally, the defendant who is granted a conditional discharge has an improved chance of making a successful transition into society.

Disadvantages

The primary disadvantage of the proposed system, from the perspective of the defendant, is the increase in the burden of proof. Rather than merely having to raise a reasonable doubt in the minds of the jurors, as in the present system, the defendant would have to prove insanity by a preponderance of the evidence before a judge.[59] This additional burden, however, is balanced by the advantages accruing to the defendant under the new system and is justified by the need to provide improved protection of society.

A defendant might argue violation of double jeopardy or due process. Conviction of a defendant who did not have the ability to harbor criminal intent, because of insanity, violates traditional concepts of mens rea. In addition, a possibility exists that an appellate court reviewing the rulings of the trial court might reverse the finding of insanity and impose a higher sentence.[60] These constitutional challenges can be met however. In *North*

instant proposal, however, does not place heavy reliance upon the expert but merely allows the expert a proper role, that of advisor to the court, without having to state a conclusion on responsibility. The facts of the crime itself are also placed in their proper perspective since the trial court has heard the facts recently and can consider them.

59. There is, of course, no constitutional problem here. Leland v. Oregon, 343 U.S. 790 (1952) (Oregon statute which placed the burden of proving insanity beyond a resonable doubt on defendant is not violative of due process). Twenty-two states currently place the burden of proving insanity by a preponderance of the evidence upon the defendant. Comment, *Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases*, 56 B.U.L. REV. 499, 503 (1976). *See also* Mullaney v. Wilbur, 421 U.S. 684, 705 (1975) (Rehnquist, J., concurring).

60. Defendant's sentence, however, may actually be shorter with a definite sentence of confinement as compared to indefinite confinement in a mental institution.

Carolina v. Pearce,[61] the United States Supreme Court found no constitutional prohibition to imposition of a more severe sentence upon the reconviction of a defendant.[62] The Supreme Court rejected arguments based on due process and double jeopardy.[63]

CONCLUSION

A recent case exemplifies that the Illinois reviewing courts may be receptive to change in the law of insanity. In *People v. Dread*,[64] the appellate court noted several criticisms of the jury's determination of the insanity issue. The court stated, "It is obvious that a re-examination of the procedural aspect of the insanity issue is timely." The court later stated that "some thought could be given to the possibility" of "a post-conviction examination, evaluation and resolution of this question [the insanity issue] outside the inherent conflicts of resolving the innocence or guilt issue in the criminal trial."[65]

The current Illinois law on criminal insanity poses major practical problems for the defendant, the expert witness, and the jury. In addition, the public is dissatisfied with a system that permits nonjudicial release of dangerous offenders. These problems can be

61. 395 U.S. 711 (1969).

62. *Id.* at 723.

63. In his attack upon Senate Bill 1, the revision of the federal criminal code which also proposed abolition of the insanity defense, Wales notes that abolition of the insanity defense may be constitutionally questionable on due process grounds, or alternately that the courts will expand the mens rea element of the crime. Wales, *Analysis of the Proposal to 'Abolish' the Insanity Defense in S.#1: Squeezing a Lemon*, 124 U. PA. L. REV. 687 (1976). This argument and the entire article are partially based upon the assumption that the question of insanity is dominated by expert opinion and that retention of the insanity defense is of benefit to the accused. Due to the practical problems involved in the insanity defense, however, these assumptions are false. The insanity defense is dominated by the lay witness, not the expert. By removing the lay jury, the lay opinion witness, and taking insanity out of the guilt-innocence determination, the accused benefits.

The court in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), considered the possible abolition of the insanity defense but rejected doing it by judicial fiat. The court noted, however, that the legislature would be the appropriate body for consideration of abolition. Strict liability has been imposed by statute for some crimes, thus removing the intent element altogether. As previously noted, the proposal herein contemplates both judicial and legislative action.

While doubts as to the constitutionality of this proposal do arise, they are not per se prohibitive of it. The abolition of the insanity defense coupled with the dispositional proceeding may withstand the due process challenge.

64. 27 Ill.App.3d 106, 327 N.E.2d 175 (1st Dist. 1975).

65. *Id.* at 114-15, 327 N.E.2d at 181.

resolved most adequately by removing the insanity issue from the trial jury and instituting a post-trial hearing to consider the proper disposition of the convicted defendant. This post-trial hearing would solve many of the problems currently faced by the defendant who wishes to assert insanity. It would allow the defendant greater availability of expert witnesses and would decrease the impact of lay witnesses. In a bench decision of insanity, the defendant would be adjudged by the flexible Illinois statutory formula for insanity rather than the harsher standard of the jury's common understanding of knowing right from wrong. Judicial release would also protect society against premature release of dangerous offenders. Implementation of all or most of the proposals discussed herein would offer significant advancements over the present system in Illinois.

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